STATE OF MICHIGAN

IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS,
THE HONORABLE E. THOMAS FITZGERALD PRESIDING

CZYMBOR'S TIMBER, INC.
a Michigan Corporation, and
MICHAEL CZYMBOR, an Individual,

Plaintiffs-Appellants,

v

CITY OF SAGINAW,
a Municipal Corporation,

Defendant-Appellee.

Supreme Court No. 130672

Court of Appeals No. 263505

Lower Court Case No. 03-050339-CH-3
Hon. Lynda L. Heathscott
Saginaw County Circuit Court

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THE CITY OF SAGINAW'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

PAGE NUMBER

INDEX OF AUTHORITIES

CASES — PAGE NUMBER

STATUTES

COURT RULES

MISCELLANEOUS

COUNTER-STATEMENT OF QUESTION PRESENTED

I. WHEN THE LEGISLATURE PASSED THE HUNTING CONTROL ACT AND CREATED THE DEPARTMENT OF NATURAL RESOURCES, DID IT INTEND TO PREEMPT A LOCAL MUNICIPALITY'S ABILITY TO REGULATE THE DISCHARGE OF WEAPONS WITHIN ITS BOUNDARIES WITHOUT OBTAINING THE PRIOR APPROVAL OF THE DEPARTMENT OF NATURAL RESOURCES?

Plaintiffs-Appellants Answer "YES".

Defendant-Appellee Answers "NO".

The Trial Court Answered "NO".

The Court of Appeals Answered "NO".

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs' preemption argument fails in its most basic premise. While, unquestionably, the numerous statutes relied upon by Plaintiff evidence a legislative intent to govern the harvesting of wildlife through hunting, the DNR may not do so when the result is "inconsistent with law":

> [t]he Department, and for their safety, may designate areas where hunting is permitted only by prescribed methods and weapons that are **not inconsistent with the law**.

MCL 324.41901(1) (emphasis added). Consequently, the Hunting Control Act and the authority of the DNR only applies in areas where hunting with firearms, traps, or other weaponry would otherwise be lawful.

To adopt Plaintiffs' preemption argument would be to deprive municipalities of the ability to independently exercise one of the most elemental aspects of their police power - - the ability to regulate the use of weapons that can, and do, kill people.

Furthermore, application of the preemption doctrine in the manner urged by Plaintiffs would do violence to the "Golden Rule" of statutory construction applied even by textualists to obtain a "common sense" result:

> The Golden Rule method of statutory interpretation dates back to John Marshall, who served as Chief Justice in the nineteenth century. The underlying concept of the Golden Rule is that there exist certain fundamental values that no statutory language can replace, the most significant of which is common sense. Historically, the Golden **Rule** has been defined as deference to the text of the statute unless the statute's **application** produced "**absurd**" or "bizarre results." If there are potentially "bizarre results," some courts limit the text of the statute to prevent further strange results.

The modern formulation of the Golden Rule is essentially the same in that an exception to the plain meaning exists when the text would produce unjust or ridiculous results. The logic behind the Golden Rule is that those unjust results would never be intended by the legislature. Even textualists, such as Justice Scalia, Justice Thomas, and the late Chief Justice Rehnquist, use the Golden Rule when it is applicable. [Andrews, *Reconciling the Split: Affording Reasonable Accommodation to Employees "Regarded As" Disabled Under the ADA - - An Exercise in Statutory Interpretation*, 110 Penn St L Rev 977, 999 (2006).]

STATEMENT OF FACTS

A. Background

The genesis of this lawsuit is the enactment of two (2) ordinances by the City of Saginaw. On August 9, 1999, the City enacted an ordinance prohibiting discharge of firearms within the City limits. Saginaw Code of Ordinances, Title X, Chapter 130, Section 130.03(D)(1) provides:

> *Discharge Prohibited.* It shall be unlawful for any person to discharge a firearm in the City.

On February 25, 2002, the City enacted an ordinance prohibiting discharge of other weaponry within the City limits. Saginaw Code of Ordinances, Title X, Chapter 130, Section 130.02 provides:

> No person shall discharge or propel any arrow, metal ball, pellet or other projectile by use of any bow, long bow, cross bow, slingshot or similar device within the City limits.

Plaintiffs own 56 acres of land within the City limits and desire to utilize the land for hunting with firearms and other weapons such as bows and arrows. It is not in dispute that, under the above ordinances, Plaintiffs are indirectly prohibited from utilizing their property in this manner with weapons falling within the scope of the ordinances. Consequently, Plaintiffs claim that the City lacks the authority to enact such ordinances.

The sole basis of Plaintiffs' argument is that regulation of hunting is a field preempted by State statutes and regulation by the DNR. The City, however, is fully authorized, and was well within its rights, to enact these ordinances. Plaintiffs make this claim despite the fact that cities have been given specific authority by the legislature to enact ordinances in order to advance the

interests of the city, including public peace and health and the safety of persons and property. Const 1963, art 7, §22 of the Home Rules City Act, MCL 117.1 *et seq*.

B. Procedural History

Plaintiffs filed the lawsuit against the City of Saginaw on November 5, 2003. Plaintiffs initially sought, but were denied, a temporary restraining order on December 19, 2003. The parties agreed that the case involves the narrow legal issue of whether the City has the power to prohibit discharge of certain weaponry within City limits or whether the field of firearm control is preempted by State laws regulating hunting.

The trial court heard oral argument regarding the City's motion for summary disposition on October 18, 2004. On November 24, 2004, the trial court issued an opinion and order granting the City's motion for summary disposition. App 88a. The opinion and order, in part, concisely states that "[a]lthough the DNR retains power and may regulate and prohibit hunting in the interest of public safety and the general welfare, pursuant to MCL 324.41901, that is not the issue here. Firearm control is a subject distinct from the field of hunting, and the DNR Act does not preempt the local ordinances enacted by the City of Saginaw." App 91a.

On June 2, 2005, the trial court issued an opinion and order denying Plaintiffs' motion for reconsideration. App 92a. The opinion and order, in part, states that Plaintiff "has not demonstrated palpable error" and Plaintiff "is attempting to reargue issues previously ruled on by the Court either expressly or by implication."

Plaintiffs appealed to the Court of Appeals and it affirmed in a published decision. App 94a. The court relied on a prior decision of the Court of Appeals which also had rejected the same preemption argument advanced by Plaintiffs in this case:

> No published decisions address the preemptive effect of §41901 on municipal firearm regulation ordinances, but this Court addressed the issue under a prior version of §41901 in *Michigan United Conversation Club v City of Cadillac*, 51 Mich App 299; 214 NW2d 736 (1974). In MUCC, this Court considered an ordinance making it unlawful "for any person to discharge any firearm . . . or shoot a bow and arrow, within the city limits except in lawful defense of his property." *Id.* at 300. The plaintiffs argued that the enforcement of the ordinance against persons hunting during open season was invalid because 1967 PA 159, as amended (codified at 1970 CL 317.331 *et seq.*) controlled hunting areas and preempted city regulation. The version of MCL 317.332 in effect at the time of that decision is substantially similar to §41901.
>
> This Court affirmed the trial court's ruling that the ordinance was valid and evidently adopted the trial court's opinion as its own. The trial court reasoned that "Act 159" did not preempt the ordinance for several reasons. First, the field of hunting regulation is distinct from firearm control. MUCC, *supra* at 301. Second, the Legislature specifically granted the city of Cadillac the authority to regulate the discharge of firearms when the city was first incorporated by local act in 1877. *Id.*, 302. Third, "Act 159" is inapplicable to cities. *Id.* at 302-303.

App 97a.

Plaintiffs applied for leave with this Court and their application was granted. App 100a. The City of Saginaw now offers this brief on appeal.

ARGUMENT

THE LEGISLATURE DID NOT INTEND TO PREEMPT A MUNICIPALITY'S ABILITY TO INDEPENDENTLY REGULATE THE DISCHARGE OF FIREARMS WITHIN ITS BOUNDARIES WHEN IT ENACTED THE HUNTING CONTROL ACT AND CREATED THE DEPARTMENT OF NATURAL RESOURCES.

A. Standard of Review

Plaintiffs are correct that appellate courts review trial court summary disposition orders de novo.

1. MCR 2.116(C)(8)

A motion for summary disposition pursuant to MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings. *Harrison v Director of Dep't of Corrections*, 194 Mich App 446, 449-50; 487 NW2d 799. The complaint must state a set of facts sufficient to meet the substantive requirements for relief. That is, the pleadings must state a claim upon which relief can be granted. *O'Toole v Fortino*, 97 Mich App 797, 802; 295 NW2d 867 (1980). A motion for summary disposition under (C)(8) should be granted only if the claim is so clearly unenforceable as a matter of law that no factual development could justify recovery. *Lepp v Cheboygan Area Schools*, 190 Mich App 726, 728; 476 NW2d 506 (1991).

2. MCR 2.116(C)(10)

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Adell v Sommers, Schwartz, Silver & Schwartz*, 170 Mich App 196, 204; 428 NW2d 26 (1988). MCR 2.116(C)(10) permits summary disposition only when, except as to damages,

there is no genuine issue regarding any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10). To determine whether a genuine issue of material fact exists, the question is whether the record which might be developed, according every reasonable inference to the plaintiff and viewing the evidence in the plaintiff's favor, would leave open a issue upon which reasonable minds might differ. *Baker v City of Detroit*, 73 Mich App 67, 74-75; 250 NW2d 543 (1976). In ruling on such a motion, the trial court must consider the pleadings, affidavits, depositions, admissions, and other available documentary evidence. MCR 2.116(G)(5).

B. Discussion

1. City Charter - Authority

Under the Michigan Constitution and statutes, cities such as Saginaw have the authority to adopt resolutions and ordinances that have the force of law relating to their own concerns, property and government. Const 1963, art 7, §22. The constitution further provides that "[t]he provisions of this constitution and law concerning counties, townships, cities and villages shall be *liberally construed in their favor*." (Emphasis added). Const 1963, art 7, §34.

The City further derives its power from the Home Rules Cities Act, MCL 117.1, *et seq*. Mandatory provisions of city charters under the Act include those for public peace, health and safety. MCL 117.3(j). Permissible charter provisions include:

> For the exercise of all municipal powers in the management and control of municipal government, whether such powers be expressly enumerated or not; for any act to advance the interest of the city, the good government and the prosperity of the municipality and its inhabitants and through its regularly constituted authority to pass all laws and ordinances relating to its

> municipal concerns subject to the constitution and general laws of this state. [MCL 117.4(j)(3).]

Regulation of the discharge of firearms and bows and arrows is a common and acceptable practice under this provision of the Act. These so-called "discharge" regulations are contained in the various charters and codes of ordinances of home rule cities across the State. In other words, it is indisputable that home rule cities, including Saginaw, have specific authority to enact ordinances in order to advance the interests of the city.

The City of Saginaw adopted its Charter in 1935 which became effective on January 6, 1936. The Charter vested the City with all the powers required or permitted under the Act. See City Charter, §1. The subject ordinances were properly enacted pursuant to the procedures of the City Charter and the Code of Ordinances.

2. DNR Regulations - Hunting Restrictions

The DNR has general jurisdiction and authority over taking of game in this State. MCL 324.40113(a). The DNR also may regulate and prohibit hunting in certain areas where the activity poses a special danger. MCL 324.41901, *et seq*. In particular, "[t]he department, in further safety, may designate areas where hunting is permitted only by prescribed methods and weapons that are ***not inconsistent with law***." MCL 324.41901(1) (emphasis added). The process of creating a "hunting closure area" is initiated by a municipality. If it deems it appropriate, the municipality *may*, by resolution, make a request to the DNR. MCL 324.41901(1). The language, at least to start the process, is *permissive*.

3. Preemption

(a) Preemption Generally.

Plaintiffs argue that this *permissive* power of the DNR to establish hunting closure areas preempts all local authority to prohibit the use of weaponry that could conceivably be used to take game. Simply put, Plaintiffs contend that the DNR regulations completely remove any power of a city to independently prevent or prohibit discharge of firearms, bows and arrows or any other weaponry that could be used to hunt. Plaintiffs further contend that the only means that a city now has to regulate this activity is under the auspices and through the procedures of the DNR regulations for hunting control areas. Plaintiffs are mistaken.

State law may, in some circumstances, preempt local ordinances. The test for such preemption is as follows:

> A municipality is precluded from enacting an ordinance if (1) the ordinance is in direct conflict with the state statutory scheme, or (2) if the state statutory scheme preempts the ordinance by occupying the field of regulation which the municipality seeks to enter, to the exclusion of the ordinance, even where there is no direct conflict between the two schemes of regulation. [*People v Llewelyn*, 401 Mich 314, 322; 257 NW2d 902 (1977).]

It cannot reasonably be disputed that the subject ordinances are not in direct conflict with the DNR regulation. Neither makes any reference to the other.[1] Accordingly, Plaintiffs claim that the statutory scheme occupies the field of regulation.

There is no legally binding decision that supports Plaintiffs' argument.[2] On the other hand, there is a case directly on point that supports the City's argument and was relied upon by the Court of Appeals in this case.

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[1] Plaintiffs attempted to make a "direct conflict" argument in the Court of Appeals. However, as that Court noted, Plaintiffs' position in this regard was directly contrary to the position they took in the trial court. App 97a.

In *Michigan United Conservation Clubs v City of Cadillac*, 51 Mich App 299; 124 NW2d 736 (1974), the Plaintiffs made an almost identical argument which was flatly rejected. In *Cadillac*, the plaintiffs filed a suit for declaratory judgment that an ordinance prohibiting the discharge of firearms within the city was invalid. In particular, the plaintiffs argued, in pertinent part, that the State had preempted the field of hunting and firearm control. The trial court granted judgment in favor of the city. In affirming the trial court, the court of appeals aptly noted as follows:

> Turning to plaintiffs' argument that the State has pre-empted the field of hunting and firearm control, it must first be observed that the argument assumes but one subject of legislation; i.e., the indivisible unity of (a) hunting and (b) firearm control. The second fallacy in the proposition is the assumption that the state regulation, supervision and licensing of hunting is not only complete and absolute on the terms expressly stated by such legislation, but creates a right exercisable everywhere and in every way not expressly prohibited by the state.
>
> Without laboring the point, it is sufficient to say that apart from Act 159, the court has been cited to no act of the legislature expressly so proclaiming and no judicial precedent finding such a legislative intent.
>
> Accepting the general proposition that the legislature has pre-empted the field of hunting regulation, and that a city could not determine its own seasons for taking game, issue its own licenses to hunt, etc., it would seem rather obvious that the separate and distinct subject of firearm control would be a matter of local interest and a proper subject of local police-power legislation. [*Id* at 300-01.]

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[2] For example, Plaintiffs cite an Attorney General opinion in support of its argument. It is well established that an opinion by the Attorney General is not precedentially binding. *Indenbaum v Michigan Bd of Medicine*, 213 Mich App 263, 274; 539 NW2d 574 (1995).

In so holding, the court provided a number of reasons for finding that there was no preemption:

1. Firearm control is a subject distinct from the field of hunting control;

2. Statutes and ordinances should be interpreted to be consistent unless there is a clear intent to the contrary; and

3. The 1967 Act did not, by its own language, apply to cities.

Plaintiffs correctly observe that the DNR statute on hunting control areas has been amended and now applies to all municipalities. However, the other two bases for the decision still apply; to wit, **firearm control is a subject *distinct from the field of hunting control* and statutes and ordinances should be interpreted to be *consistent unless there is a clear intent to the contrary*.**

In addition to the counter intuitive nature of the Plaintiffs' argument, there is another very good reason their preemption claim must fail. When the legislature intends to preempt a field it certainly knows how to clearly and unequivocally express that intent. An excellent example is *Shelby Twp v Papesh*, 267 Mich App 92; 704 NW2d 92 (2005). In that case one issue presented was whether the Michigan Right to Farm Act preempted a local ordinance. Included in the Right to Farm Act is MCL 286.474(6). Language in that section is quite instructive. It specifically provides that ". . . it is the express legislative intent that this act preempt any local ordinance." It also provides that ". . . a local unit of government shall not enact, maintain, or enforce an ordinance, regulation or resolution that conflicts in any manner with this act . . . ." Numerous other statutes also contain express language exhibiting a legislative intent to preempt. For

example, the Consumer Mortgage Protection Act, MCL 445.1644, Michigan Vehicle Code at MCL 257.707e, and the Hazardous Materials Transportation Act at MCL 29.480.[3]

Whether the state scheme is pervasive depends upon how the scheme is defined. The DNR pervasively regulates hunting. However, **the DNR does not pervasively regulate the discharge of firearms or the control of firearms in general.** These are separate and distinct areas of regulation. Moreover, many different areas of Michigan statutes relate to firearm control.[4] Even at the state level, the field is not controlled exclusively by the DNR.

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[3] These expressly stated legislative intentions of preemption render Plaintiffs' reliance on MCL 324.41702 both puzzling and misplaced. In **that** section the Legislature expressly stated its intent to preempt local ordinances with regard to, and only, hunting on Sundays. If the Legislature intended the **entire** Hunting Control Act to preempt local ordinances regarding the discharge of weapons, there certainly would have been no need to for it to expressly so state regarding Sunday hunting. Fatal to Plaintiffs' position is that this particular section contains the only language of preemption to be found in any of the statutes upon which Plaintiffs purport to rely. Plaintiffs attempt to rely upon a sentence in MCL 324.41902 requiring ordinances to be identical in all respects to regulations promulgated by the DNR. Plaintiffs ignore the context of this provision. It is only within the context of a municipality codifying regulations established by the DNR.

[4] See Michigan State Police, 1935 PA 59; Firearms Act, 1927 PA 372; Explosives Act of 1970, 1970 PA 202; Emergency Management Act, 1976 PA 390; The Fourth Class City Act, 1895 PA 215; Firearms and Ammunition, Act, 1990 PA 319; Michigan Vehicle Code, 1949 PA 300; Aeronautics Code of the State of Michigan, 1945 PA 327; Wildlife Sanctuaries, 1929 PA 184; Natural Resources and Environmental Protection Act, 1994 PA 451; Public Health Code, 1978 PA 368; Private Detective License Act, 1965 PA 285; Private Security Business and Security Alarm Act, 1968 PA 330; The Revised School Code, 1976 PA 451; Rural Cemetery Corporations, 1869 PA 12; Revised Judicature Act of 1961; 1961 PA 236; Sport Shooting Ranges, 1989 PA 269; Probate Code of 1939, 1939 PA 288; The Michigan Penal Code, 1931 PA 328; Death or Injuries from Firearms, 1952 PA 10; Careless, Reckless, or Negligence Use of Firearms, 1952 PA 45; Spring, Gas, or Air Operated Handguns, 1959 PA 186; The Code of Criminal Procedure, 1927 PA 175; Crime Victims Rights Act, 1985 PA 87; Corrections Code of 1953, 1953 PA 232; Prison Code, 1893 PA 118; Liquor, Narcotics, and Weapons Prohibited on Prisons, 1909 PA 17; County Jail Overcrowding State of Emergency, 1982 PA 325; Alcoholic Liquor, Controlled Substances, and Weapons, 1981 PA 7.

(b) The Statutory Provisions Relied Upon by Plaintiffs Do Not Support Their Preemption Argument.

In its order granting leave, this Court directed the parties to address what impact, if any, MCL 324.41901(1) and (2), and MCL 324.41701 thru 41703 have on the preemption issue. The answer is no impact at all.

As previously stated, the application of these sections are all premised upon the area in question being one were lawful hunting is allowed. MCL 324.41901(1).

Additionally, while MCL 324.41901 and 41902 permissively provide for a means to regulate hunting areas, there is no language in either section that even remotely suggests a legislative intent to vest final authority regarding firearm control with the Department of Natural Resources.

While MCL 324.40113(a) vests exclusive authority to regulate the taking of game with the DNR, no language suggests an attempt to preempt local municipalities in regulating the discharge of weapons within its limits.

Finally, let us return to where we began, with the Golden Rule. The Hunting Control Act and Statutory Provisions involving the DNR were obviously designed to provide additional management and restrictions with regard to the harvesting of game. These provisions do not **confer** the right to hunt absent DNR action; they restrict hunting rights. Plaintiffs' argument stands the legislative intent on its head.

CONCLUSION

Plaintiffs come before this Court with no authority in support of their position, and a decision from the Court of Appeals in the *City of Cadillac* case explicitly rejected what the Plaintiffs now argue.

While Plaintiffs' application is replete with references to the public policy of this state regarding hunting, strangely absent is any acknowledgement of this state's public policy regarding the health and well being of its citizens.

This Court should affirm the decision of the Court of Appeals in this case.

Respectfully submitted,

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Dated: November 2, 2006